



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

Honorable W. Lee O'Daniel  
Governor of Texas  
Austin, Texas

Dear Sir:

Opinion No. O-2264  
Re: Is the cigarette tax levied  
by Article 7047c, Vernon's  
Annotated Civil Statutes, a  
direct tax upon the purchaser  
of such cigarettes in Texas?

We are in receipt of your letter of April 20, 1940, with attached letter to you from Honorable Cordell Hull, Secretary of State, wherein you submit for our determination the question of whether the cigarette tax levied by Article 7047c, Vernon's Annotated Civil Statutes, is a direct tax upon the purchaser of cigarettes in Texas.

This question cannot be answered categorically, because under some aspects of the law and facts, the cigarette tax law of Texas levies a direct tax upon the purchaser of cigarettes in Texas, while in other instances the tax is upon the sale of cigarettes in Texas and is not a direct tax upon the ultimate purchaser or consumer of such cigarettes.

Section 2 of Article 7047c, Vernon's Annotated Civil Statutes, hereinafter referred to as the Cigarette Tax Law of Texas, levies a cigarette tax and provides that "the tax shall be paid only once by the person making the 'first sale' in this state and shall become due and payable as soon as such cigarettes are subject to a first sale in Texas, it being intended to impose the tax as soon as such cigarettes are received by any person in Texas for the purpose of making a 'first sale' of same."

Section 1 (h) of the Cigarette Tax Law defines "first sale" as follows:

"(h) 'First Sale' shall mean and include the first sale or distribution of cigarettes in intra-state commerce, or the first use or consumption of cigarettes within this State." (Underscoring ours)

In connection with the statutory definition of "first

Honorable W. Lee O'Daniel, Page 2

sale," the Legislature, by Section 1 (m) of the Act, has defined "distributor" as follows:

"(m) 'Distributor' shall mean and include every person in this State who manufactures or produces cigarettes or who ships, transports, or imports into this State or in any manner acquires or possesses cigarettes and makes a 'first sale' of the same in this State; the said term shall also include every person in this State who in any manner acquires or possesses unstamped cigarettes for the purpose of making a 'first sale' of the same within this State." (Underlining curs)

From the foregoing references to the Cigarette Tax Law, it may be readily seen that the excise cigarette tax levied thereby is caused to accrue in two contingencies: (1) upon the first sale or distribution of cigarettes intra-state, by a cigarette dealer, either wholesale or retail; (2) upon the use or consumption of cigarettes not purchased under the foregoing conditions.

Under the first factual situation, the dealer is constituted a "distributor," as defined by statute above quoted, by virtue of the "first sale," as defined, of the cigarettes in this state. The quantum of the tax is measured by the number of cigarettes so sold intra-state, and although the amount of such tax may, in the discretion of such dealer, be passed on as part of the purchase price to be paid by the ultimate consumer, nevertheless in this instance the cigarette tax is not a tax against the ultimate purchaser of such cigarettes.

But in the second instance above stated, the cigarette tax does accrue and is a charge against the ultimate purchaser or consumer of the cigarettes in Texas as a direct tax, such ultimate user or consumer in this case becoming a "distributor" of cigarettes by virtue of making the first use of the cigarettes in Texas. It is obvious that the only factual situation under which this tax could accrue against the ultimate user or purchaser of the cigarettes would be upon cigarettes purchased in inter-state commerce rather than in intra-state commerce from a licensed dealer in such cigarettes.

Honorable W. Lee O'Daniel, Page 3

In this contingency, the cigarette tax levy partakes of the nature of an excise or privilege tax upon the privilege of using or consuming cigarettes within this state.

In summation, we advise that the cigarette tax levied by Article 7047c, Vernon's Annotated Civil Statutes, is both a sales tax and a "use" tax. It is an excise levy with a dual purpose of reaching either the seller or the purchaser of cigarettes in Texas, depending upon the method of acquiring and disposing of the cigarettes in this state. Simply stated, if the cigarettes are sold in Texas, this excise tax is levied upon the person, firm or corporation making the "first sale" of the cigarettes as defined by statute; on the other hand, if the cigarettes are acquired through the channels of inter-state commerce and without a sale having transpired in Texas, the tax is a levy and burden upon the ultimate purchaser or user of the cigarettes, as an excise or privilege tax upon the use or consumption of such cigarettes.

Trusting the foregoing fully answers your inquiry,  
we are

Yours very truly

ATTORNEY GENERAL OF TEXAS

By

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FMN/oe

APPROVED MAY 29, 1940

*Gen. H. Mann*

ATTORNEY GENERAL OF TEXAS

